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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 291

MARION KOTCH, ET AL.,
Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,
Appellees.

BRIEF ON BEHALF OF THE APPELLANTS.

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REFERENCE TO OFFICIAL REPORT OF THE OPINION DELIVERED BY THE COURT BELOW.

The opinion of the Supreme Court of Louisiana in this cause is reported: 209 La. 737, 25 So. 2d. 527.

STATEMENT AS TO JURISDICTION.

In this suit, filed in the district court of Orleans Parish, Louisiana, the plaintiffs, appellants here, attacked the constitutionality of the Louisiana pilot law, Act 54 of 1908 of the Louisiana Legislature, as amended by Act 134 of 1942, on the ground that it violates the Fourteenth Amendment of the Constitution of the United

States. The suit was brought against the Board of River Pilot Commissioners for the Port of New Orleans, created by the act, and against the individual members of the board. The district court held the act to be constitutional, dismissing (R. p. 23) the plaintiffs' suit on an exception of no cause of action filed by the defendants. The plaintiffs appealed to the Supreme Court of Louisiana, the highest court of the State, and that court affirmed (R. p. 4) the judgment of the district court.

Jurisdiction of the Supreme Court of the United States in this cause is sustained by Section 344(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE.

The question presented by this appeal is purely one of law. The plaintiffs' suit was dismised (R. p. 22) in the state court on an exception of no cause of action filed by the defendants. By the law of Louisiana, all well-pleaded allegations of fact are admitted in considering an exception of no cause of action *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 3d. 233; *Jones v. Saucier*, 203 La. 744, 14 So. 2d. 775; *In Re Nunez*, 203 La. 847, 14 So. 2d. 680. The exception of no cause of action in Louisiana is similar to the demurrer at common law.

Act 54 of 1908, as amended by Act 134 of 1942, undertakes to regulate pilotage on the Mississippi River. The original law, Act 54 of 1908, conferred upon pilots commissioned thereunder the exclusive right of piloting vessels engaged in foreign trade from the Passes at the mouth of the Mississippi *to* the port of New Orleans. Act 134 of 1942 amended the 1908 by extending the commissioned pilots exclusive jurisdiction to include the port itself.

It should be borne in mind that piloting of vessels engaged in coastwise trade is regulated by an act of Congress (Rev. St. U. S. #444, U. S. Camp. St. 1901, p. 3037), and hence is not subject to state regulation. *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52. It follows therefore that Act 54 of 1908, as amended, applies exclusively to foreign trade vessels.

The appellants, Marion B. Kotch, John L. Richards, Adolph Clark, William F. Figarola, Charles P. Henly, Edward J. McConnochie and Marion F. Short, instituted this suit (R. p. 17) against the Board of River Port Pilot Commissioners for the Port of New Orleans and the individual members of the Board to have Act 54 of 1908, as amended by Act 134 of 1942, declared unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. They sought, in the alternative, to have the 1942 amendment alone declared unconstitutional on that ground. And they asked, again in the alternative, that if the act and

amendment be held valid, then that the defendant board be ordered by mandamus to examine them on their qualifications as pilots, and finally to certify them to the governor for appointment.

The plaintiffs, appellants here, alleged (R. p. 17) in their petition: that they are licensed river pilots holding first class licenses from the United States Government; that they are well qualified, having been actively engaged as pilots—on the Mississippi River and other waters but principally on the Mississippi—for more than 15 years; that Act 54 of 1908 confers upon the defendant board and on the commissioned pilots themselves absolute power in respect to appointments—the act declares that "no applicant shall be considered by such board unless he * * * shall have served 6 months apprenticeship in his proposed calling", and at the same time gives the commissioned pilots the right to name the apprentices; that hence only those having the favor of the pilots themselves may be commissioned; that a tight monopoly has resulted—in 1938 and 1944, the last times appointments were made, of the 15 appointed, 12 were related to then commissioned pilots or predecessor pilots, and of the 41 present commissioned pilots, 34 of them are related to other pilots, or to predecessor pilots; that in the past the plaintiffs have centered their activities largely to the port itself—being barred by Act 54 of 1908 from piloting foreign trade vessels below the port's limits; that coastwise shipping represents only a minor part of the business on the Mississippi—far too small for them

to earn a livelihood from that source alone; that the 1942 amendment, closing the port to them, will force them to give up their occupation as pilots and seek other pursuits.

The judge of the district court maintained the defendants' exception of no cause of action and dismissed the plaintiffs' suit. The Supreme Court of Louisiana affirmed the judgment on appeal. And the appeal to this court was then taken.

SPECIFICATION OF ASSIGNED ERRORS.

(1) Act 54 of 1908, as amended, is unconstitutional violating the Fourteenth Amendment of the Constitution of the United States. In particular, it violates the equal protection clause of the Fourteenth Amendment in that it gives to the pilot board and the commissioned pilots absolute control of appointments. The Supreme Court of Louisiana erred in holding the act constitutional.

(2) Act 54 of 1908, as amended, is unconstitutional, as stated above, on its face. Further, the act has been administered always in an arbitrary, unfair and discriminatory manner, and even assuming *arguendo* that the act is not unconstitutional on its face, the denial of justice is still within the prohibition of the Fourteenth Amendment, under the doctrine of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. The Supreme Court of Louisiana erred in holding otherwise.

(3) The Supreme Court of Louisiana rested its decision in this case upon the ruling of this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52. That case does not support Act 54 of 1908, as amended, and the Supreme Court of Louisiana erred in holding that it does.

ARGUMENT.

Act 54 of 1908 as amended is clearly unconstitutional. It gives the commissioned pilots airtight control of appointments. It is plain that the act was drawn with that purpose in view. Section 1 creates the Board of River Port Pilots for the Port of New Orleans; Sections 2 and 3 provide for the appointment by the governor of the first group of pilots—28 in number; and Section 4 declares that "whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examination", and states that "no applicants shall be considered by said board *unless he * * * shall have served six months' apprenticeship in his proposed calling.*" (Italics ours.)

No one may be considered for appointment unless he first serves as an apprentice to a commissioned pilot. The pilots name the apprentices, of course. Thus they control all appointments. The case is just that simple.

Sections 1, 2, 3 and 4 are quoted below:

> "Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the Governor shall appoint, by and with the advice and consent

of the Senate, three (3) citizens who shall form the Board of River Port Pilot Commissioners for the port of New Orleans. The first commissioners shall be appointed from those pilots who have for at least one year immediately preceding the passage of this act, exercised the functions of river pilots, from the head of the Passes to the port of New Orleans upon sea-going vessels; and thereafter said appointments shall be exclusively made from river port pilots by virtue of this act commissioned. The Governor, in appointing said commissioners, shall designate the president of the Board. Said commissioners shall be removable by the Governor for cause, and shall qualify by taking an oath of office.

"Section 2. That there shall be a body of pilots known as 'River Port Pilots' whose duty it shall be to pilot sea-going vessels from the head of the Passes opposite Pilot Town, to the port of New Orleans and return. There shall be twenty-eight (28) such pilots, appointed and commissioned by the Governor immediately upon the promulgation of this act.

"Section 3. That the first twenty-eight (28) river port pilots hereinbefore provided for in Section 2, shall be appointed by the Governor from those pilots who have been actively and continuously engaged for one year previous to the passage of this act in piloting sea-going vessels from the head of the Passes to the port of New Orleans and return, and thereafter there shall not be less than twenty such pilots.

"Section 4. That whenever there exists a necessity for more pilots among the river port pilots, the said Board of River Port Pilot Commissioners shall hold examinations, under such rules and regulations, and with such requirements as they shall

> have provided, with the Governor's approval, provided that *no applicant shall be considered by said Board, unless he* submits proper evidence of moral character and is a voter of this State, and *shall have served six months' apprenticeship in his proposed calling,* and upon the certificate of the Board of the Governor that the applicant has complied with the provisions of this act, the Governor may, in his discretion, appoint to existing vacancies." (Italics ours.)

The apprentice provision is plainly mandatory. The act states that "upon the certificate of the Board to the governor that the applicant has complied with the provisions of this act, the governor may, in his discretion, appoint to existing vacancies". The governor can make no appointment except upon the board's certificate. And by the provisions of the act "no applicant shall be considered by said Board, unless he * * * shall have served six months apprenticeship in his proposed calling". Note, it is not six months pilot experience, simply, that is required—"apprenticeship in his proposed calling" is required. "Apprentice" is defined in Funk & Wagnall's dictionary thus: "One who is bound by indenture to serve another in order to learn a trade or business."

In its opinion the Supreme Court of Louisiana acknowledged that the apprentice provision is mandatory. The court said (R. p. 16):

> "Plaintiffs ask the court to do those things because they allege that the Crescent River Port Pilots Association [organization of commissioned pilots], a private organization created under the terms of the act, selects its own apprentices, as it is authorized

to do under the statute. But the Court can not comply with plaintiffs' request without creating in lieu of a constitutionally enacted statute a ruling of its own, based upon the alleged hardship arising out of the selection by the Crescent River Port Pilots Association of the apprentices who might thereafter become members of the organization. This the Court can not do. The justice or injustice of the statutory provision permitting the River Port Pilots Association to select apprentices is a question for the Legislature and not for the Court."

Again the court said (R. p. 13):

> "There is nothing in the law which requires the Crescent River Port Pilots Association to admit to membership persons not of their selection. If an apprenticeship must be served under pilots who are members of the association, because as a practical matter it may not be served otherwise, there is nothing in the law which forbids this situation to arise."

The Supreme Court of Louisiana upheld the statute though acknowledging that it confers upon the commissioned pilots absolute control of appointments, by virtue of the apprentice provision. The court rested its opinion on the decision of this court in *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224, 25 S. Ct. 52. The Supreme Court of Louisiana said (R. p. 9):

> "The leading and controlling case on the subject is Olsen v. Smith, 195 U. S. 332, 25 S. Ct. 52, 55, 49 L. Ed. 224. There the Supreme Court of the United States announced the principles that should be applied in determining the constitutionality of

legislative acts regulating pilotage. In that case, the constitutionality of an Act of the Legislature of the State of Texas regulating the business of pilotage was sustained. The Texas law, like the Louisiana law, provided that the Governor should appoint a board to which was granted the power of fixing charges, regulating the manner in which the pilot should perform their duty, examining them as to their qualifications, hearing complaints against them and, if the occasion required, to suspend them until the Governor should act. The authority was conferred upon the Governor to appoint such number of branch pilots as might from time to time be necessary, each of whom should hold office for two years, subject to removal by the Governor at pleasure. Anyone who was not duly commissioned was prohibited from engaging in the business of pilotage so far as the statute provided for rendering of pilotage services by the duly appointed pilots. The only difference between the Texas law and the Louisiana law is that the Board of Pilot Commissioners under the Louisiana law is composed of three members, whereas the Texas board is composed of five members. The nature of their powers and duties is substantially the same. The term of appointment under the Texas law is for two years. Under each statute, however, the pilots so appointed are subject to removal by the Governor at pleasure. The Supreme Court of the United States, speaking through Mr. Justice White, later Chief Justice, and formerly a Justice of this Court, held that no inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed. And further, since the State, under

its power to regulate, has the right to appoint and commission pilots, no monopoly or combination can arise from the fact that the authorized agents of the State are alone permitted to perform the duties with which they are charged under the law. After discussing these propositions, Justice White remarked as follows: 'When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion,—which we do not at all imply is the case,—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises'. And so we may remark here, if the statutes in question are unwise the remedy lies with the Legislature in whom the ultimate authority on the subject is vested and not with the court to deny the right of the power of the State to exercise its authority over a matter wholly within its control."

The Supreme Court of Louisiana is in error. *Olsen v. Smith, supra,* does not support the appellees. The jurisprudence, involving the Texas pilot law which was considered in *Olsen v. Smith, supra,* and which culminated in that decision, actually supports the positions of the appellants.

To understand *Olsen vs. Smith, supra,* the jurisprudence leading up to that decision must be reviewed.

The Texas pilot law was first attacked in *Petterson v. Board of Commissioners*, (Tex. Cir. App.), 57 S. W. 1002, decided in 1900. Article 3792 of the Revised Statutes of Texas gave the pilot board authority "to establish a term of probation not exceeding one year, as a deputy pilot". In *Petterson v. Board of Commissioners, supra*, the constitutionality of the Texas law was attacked on the same ground that Act 54 of 1908 as amended is here attacked, namely, that it gave the commissioned pilots the right to control all appointments. In *Petterson v. Board of Commissioners, supra*, the court upheld the Texas law. But it did so only after holding that the deputy provision in the statute is *directory*. The court held that under the Texas law the commisioned pilots do not control the appointments since the provision requiring service as a pilot deputy is directory and might be ignored by the governor. The court inferred plainly that the statute would be unconstitutional if the deputy provision were mandatory.

The distinction between the Act 54 of 1908 as amended and the Texas pilot law is plain. The apprentice provision in the Louisiana pilot law is mandatory. The Supreme Court of Louisiana so held. And counsel for the appellees concede that to be true.

We shall quote from *Petterson v. Board of Commissioners, supra*, at length—so that Your Honors will have a clear understanding of the ruling there made. *Olsen v. Smith, supra*, does nothing more than affirm its doctrine, as we shall point out hereafter. In *Petterson v. Board of Commissioners, supra*, the court said:

"Then follows an allegation that there are only 11 branch pilots in service at the port; that they have unlawfully asociated themselves together into a co-partnership under the name of 'Galveston Pilots' Association', for the purpose of monopolizing and controlling the pilotage of the port, and have so acted for several years; that they refuse to appoint any one as deputy who will not agree to act under and subordinate to the rules, orders and regulations made by the association; that the refusal of appellees to examine any one except such as have been appointed by the present branch pilots as a deputy pilot, and the refusal of said pilots' association to deputize petitioner or any one else who desires to work in competition with said association, creates a monopoly in favor of the existing pilots, contrary to law, and against the rights of petitioner.

"The articles of the Texas statutes (Rev. St.) bearing upon the subject provide as follows:

"Article 3790: 'The governor shall appoint, with the consent of the senate for each port whose population and circumstances shall warrant it, * * * a board of five persons of respectable standing under the denomination of "commissioners of pilots"'. The remainder of the article prescribes their qualifications, etc., and empowers the governor to suspend, fill vacancies, etc.

"Article 3791 provides that 'the board of commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they may find already appointed at the time of their organization;

and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the governor, where new appointments are proper, such as are meritorious, and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized after due hearing of accusation testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office. The governor, however, shall have power at his will and pleasure to remove any branch pilot or to reinstate any one who has been so suspended.'

"Article 3792 provides that the board of commissioners 'shall require a certain term of residence in the state of Texas to authorize any person to exercise the functions of a branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year as a deputy pilot before any person can exercise the functions of his office.'

"Article 3793 provides: 'The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix the rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the

board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution.'

"Article 3794 provides: 'The board shall be authorized and required to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services * * * as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master * * * when such pilot might have been landed.' The remaining portions of this article fix the maximum of such compensation, and provides for appeals from the judgments of the board in such cases.

"By article 3796 the governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term only.

"By article 3797 branch pilots are required before entering upon the duties of their office, to enter into bond with sureties in the sum of $5,000, payable to the governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond is to be approved by the board of commissioners, and filed with the secretary of state. The oath of office prescribed by the constitution is also required to be taken and subscribed by each pilot, such oath to be indorsed on the back of the bond, and together with the bond, is to be recorded in the county of the port before being forwarded to the governor.

"Under article 3798, each branch pilot may appoint two deputies, subject to examination and approval by the board, and a pilot appointing a deputy without such approval forfeits his own appointment. The board is also clothed with authority to restrict all deputy pilots from piloting vessels over a certain draught.

"Article 3799 provides the penalties of suspension and dismissal for certain named acts of malfeasance.

"Article 3800 fixes the rate of pilotage upon classes of vessels subject thereto, and provides that the master of a vessel refusing the services of a pilot shall be liable to such pilot for half the rate of pilotage which he would have earned if accepted.

"Article 3803 prescribes a penalty of $50 against any unauthorized person acting as branch pilot, such penalty to be recovered at the suit of any duly-authorized branch pilot, brought in any court of competent jurisdiction.

"The above articles are believed to be all of the Texas pilotage laws which have any bearing on the questions raised on this appeal, or which are necessary to be discussed in this opinion.

"The trial court seems to have held the petition insufficient to show the plaintiff entitled to the writ, (1) because under the law the position of branch pilot is an office to which the governor has the power, in his absolute discretion, to appoint such persons, and such a number of persons, as he may consider necessary for the needs of the port, and

the petition does not show that the governor has thought it necessary to appoint a greater number than are now in service; (2) these appointments are required under the law to be made from the class of persons who have complied with the requirements as to residence in the state for the time fixed by the commissioners, and as to service as deputy pilot for the time fixed by them, and the petition does not allege the plaintiff to be one of that class.

"Appellant's first, second, fourth, fifth, and sixth assignments of error are thus interpreted by his proposition thereunder: 'When a skilled seaman, who is by education, training and experience mentally, morally, and physically qualified to act as pilot for the port of Galveston, applies to the commissioners to be examined as to his qualifications to act as branch pilot, the board should examine the applicant, notwithstanding the fact that he has never been appointed or served as deputy pilot for the port.' Under this appellant contends that the provision empowering branch pilots to select two deputies, and providing that no person who has not served the requisite term as deputy can become a branch pilot, is inoperative—First, because the article undertaking to empower the board to fix a term of probation for deputy pilots is void for uncertainty, and if not void for uncertainty is merely directory and if not void nor merely directory is unconstitutional, because it places it in the power of pilots already servicing to continue themselves in office or become their own successors by refusing to appoint deputies, or by discharging those appointed before the time of probation expires; second, the law, construed as a whole clearly requires the board to examine and report upon every appli-

cant, in order that the governor, in his discretion, may appoint such persons, and such number, as the needs of the port may require, and thus accomplish the objects contemplated by the law.

"While the latter clause of article 3792 is of faulty construction, we do not believe it can be held to be void for uncertainty. The sense of it seems to us very plain; and the defect complained of is so insignificant and obscure that a casual reading of the article does not disclose it. We do not deem it necessary to follow counsel for appellant in his discussion of the rules of construction. The article has stood unchanged since 1846, the date of its passage. So far as we are able to ascertain, the construction placed upon it has been uniform. No one has been misled by the defective phrase, 'as also to', etc. It is not a statute which has only occasionally been called into force, but has been an active, operative statute by which the boards of pilot commissioners have been controlled, and under which the important service of pilotage has been conducted. If a graver reason were urged, the court might well hesitate to hold a statute void for uncertainty which has for so many years received a common and uniform construction, and has answered the purposes for which it was passed. If, as contended by appellant, the provision is merely directory, we fail to perceive in what respect appellant could be benefited by such a holding. Directory statutes are not void, nor may they be suspended for that reason at the suit of an individual. The question usually arises when the validity of some official act is called in question on the ground that the statutory prerequisites have not been performed. If the statute is mandatory, the official act is invalid; if directory

merely, the act may nevertheless stand. *In the case at bar there are strong reasons for holding the provision directory, and this aspect of the clause will be referred to further on in this opinion.* (Italics ours.)

"The further contention of appellant in this connection, to the effect that the provision is directory, and therefore cannot limit a prior mandatory provision which requires the board to examine all applicants, is, we think, unsound. These laws were not passed for the furtherance or preservation of any individual right, but are necessarily a limitation on the rights of individuals. Their clear and manifest purpose is to secure a high order of service in a calling affecting interests of vast public and private concern. The securing of efficient pilots is not only needful in the interest of passengers and property which may be carried in ships, but the public is concerned in keeping its ports and navigable streams free from obstruction by wrecked or disabled vessels. Since the government has undertaken at public expense to maintain the depth of water in the more important ports and streams, and to keep them free from obstruction, the public concern is even greater, and the government clearly has the right and power to provide adequate means for the selection of suitable persons to perform the service. In 1789, Congress, finding that the various states whose territory touched navigable waters and enacted systems of pilotage laws, and perceiving that in the nature of things, and because of the variant conditions existing in various ports and waters, a uniform system was unwise, if not impossible, expressly adopted such laws upon the subject as had already been enacted by the several states, and such

as thereafter might be passed by them; thus relegating to the states a power which by an article of the federal constitution they had conferred upon Congress. For this reason the states are held in the enacting of laws upon this subject to be exercising an original power, and not one delegated by Congress. The Chase (D. C.) 14 Fed. 854. In the exercise of this power, they have been uniformly unmindful of the private right to exercise the calling of a pilot, and have unhesitatingly sacrificed such right where it appeared to stand in the way of the object to be accomplished. A like purpose runs through every article of the law in question, and it seems clear that when the duty was imposed to 'examine each new applicant, * * * recommending to the governor, where new appointments are proper, such as are meritorious', it was meant to provide against the recommendation of any person without the careful examination required. *Of course, there is a point beyond which the lawmakers cannot go in subordinating the interest of the individual to the welfare of the public, and if the petition had alleged a compliance on the part of plaintiff with the provisions as to residence and service, and had further alleged that the governor had declared that new appointments were proper, the court would doubtless have allowed the writ to prevent the discrimination against him which would have been apparent from the allegation. He would have had the same right as another to have his name considered by the governor, if he was found to possess the requisite qualifications.* That the right of an individual to examination and appointment is not absolute is evidenced by parts of this very law which are not assailed, notably the power conferred on the governor to limit the number of pilots in any

port, being controlled in his discretion by the needs of the port; also the power of the governor to remove any pilot for any reason, or for no reason, the language of the act being, 'at his will and pleasure'. (Italics ours.)

"Recurring to article 3791, it seems to us to have been intended that the governor should have both the appointing power and the discretion as to the needs of the port, the board in this latter respect being advisory. This conclusion is authorized both by the language of the act and the object sought to be accomplished. The board resides at the port, and, being charged with the duty of appointing stations and hours for the pilots, must, in the exercise of that duty, learn the necessities of the port, and it would be their plain duty, if new or other pilots were necessary, to call the governor's attention to the situation, and recommend suitable persons from whom he might select. The governor might ignore their suggestions, or conclude, in the absence of suggestions, that more were necessary, in which event he could require them to furnish him with names as provided by law. To hold that the board should examine all who apply would be to compel them to do in many cases an idle and futile thing; for if no vacancy existed, and no new appointments were necessary; there could be no purpose to be accomplished by the examination. If any considerable time elapsed from the date of the examination until the appointment was necessary, the applicant might in many ways become unsuitable,—might cease to be 'meritorious'. The clause, 'where new appointments are proper', cannot be held to be meaningless. If the state had the power to limit the number of pilots at this port, the whole act can stand. (Italics ours.)

"Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of perversion or abuse, cannot render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first place, if the clause requiring a term of service as branch pilot be directory (and it seems to be so), the governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications. Again, the board has power to suspend, and the governor to remove, in such a case, and the pilots in office could be so disciplined as to compel a cessation of the abuse complained of. If the pilots in office, for the purpose of maintaining themselves in office, should adopt a system of discharging their deputies just before the expiration of the probationary period, their purpose could be easily thwarted under the power possessed by the Board to fix or change the probationary period at will, and this could be done without notice, and the deputies in service be thus placed in a position to be examined for appointment." (Italics ours.)

Petterson v. Board of Commissioners, supra, did not reach this court. It was followed closely by *Olsen v. Smith,* (Tex. Cir. App.) 68 S. W. 320, decided in 1902. (*Olsen v. Smith* was decided in this court in 1904.) The latter case involved the identical question raised in *Petterson v. Board of Commissioners, supra.* The Texas court again upheld the Texas pilot laws—and did so squarely on the authority of *Petterson v. Board of Commissioners, supra,* which held the deputy provision to be merely directory. The court said:

> "The suit was brought by defendants in error, as duly commissioned branch pilots of the port of Galveston, against plaintiff in error, to enjoin him from piloting or attempting to pilot sail vessels or registered steamers bound to or from foreign ports in or out of the port of Galveston, and from acting or assuming to act in any manner as branch or deputy pilot or with respect to such vessels. The decree was for injunction accordingly. The petition alleged in substance: That defendant is not a branch pilot or deputy pilot, but notwithstanding his want of power or right to act, he assumes to act and does act as such; offers his services to incoming and outgoing vessels, and is occasionally taken on board and employed by them as a pilot, contrary to law; and declares his purpose to continue holding himself out as a pilot, and petitioners believe and aver that his threats of such intended violations of law will be carried into effect, unless he is restrained. That his unlawful acts and conduct, and his avowed determination of persisting therein, have caused and are causing plaintiffs substantial and irreparable injury, and prevent plaintiffs from exercising their official rights and duties as pilots and

from earning and receiving the fees and compensation fixed by law and by the board of pilot commissioners of said port. That defendant is insolvent, and plaintiffs have no other adequate remedy than that of injunction. The substance of defendant's answer will appear from the several assignments of error as they are discussed. Demurrers were made to the petition, which were overruled, and plaintiffs' demurrers to the answer were sustained, and decree was entered granting plaintiffs the relief prayed for; the decree reciting that it appeared to the Court that they were entitled to such relief. There is no statement of facts, and we infer that the judgment was rendered on admission to the answer. * * *"

"Under the fourth and fifth assignments propositions are made: (1) 'That the legislature cannot declare a trade, profession, occupation, or business to which none of the functions of government attach, to be an office, limit the number of citizens who may hold the same, and prohibit all others, whatever may be their qualifications and fitness from pursuing such trade, profession, occupation, or business'; and (2) 'the provisions of the statute which declare a pilot to be an officer, and limit the number of citizens who can serve as pilots to appellees, and such deputies as they may choose to appoint, are void.' The assignments are, in substance, that our statute violates section 1 of the fourteenth amendment of the federal constitution, and section 19, art. 1, of our state constitution, in prescribing the qualifications and regulating the appointment of branch pilots. Upon this subject much might be written. But in view of the universality of such laws, and their long observance and enforce-

ment in commercial countries, very little need be said. The object of such laws is to protect life and property from the perils incident to navigation. Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805. The subject comes fairly within the scope of governmental or police functions. *We consider the case of Petterson v. Board, (Tex. Civ. App.) 57 S. W. 1002, as deciding the question raised by these assignments against the contention of appellant.*" (Italics ours.)

It will be seen that in *Olsen v. Smith, supra*, the Texas court simply adopted the rule announced in *Petterson v. Board of Commissioners, supra*. And as we have pointed out, the basis of the latter decision was that the commissioned pilots do not control appointments, since the deputy provision is merely directory.

In *Olsen v. Smith, supra*, the Texas court went on to say:

"A proposition under the tenth assignment is as follows: 'It is against public policy and illegal for defendants in error, either as officers of the state or individuals, to confederate and conspire against the plaintiff in error, and to use their means and influence for the purpose of preventing him from becoming a branch pilot, and from pursuing his occupation as a pilot.' This proposition is based on an allegation in defendants' answer, and stricken out, which is as follows: 'That petitioners have been and are now, confederating and conspiring to prevent defendant from pursuing his trade or vocation as a pilot at the port of Galveston, and are using their means and influence to harass and injure him,

and also to prevent any change in the statutes of the state regulating the appointment of branch or deputy pilots.' We fail to perceive how this would constitute a defense to a suit for injunction brought by plaintiffs to enjoin defendant from interfering with the exercise of their official duties, or with the emoluments of their office. It was admitted in the answer that plaintiffs were branch pilots, as alleged, and that defendants had not been created a branch or deputy pilot, and that he had been acting and offering to act as pilot to incoming and outgoing British vessels. If so, the injunction was properly granted; and the fact that plaintiffs may be using their combined efforts to prevent any change in the laws, or to prevent plaintiff from receiving appointment as branch or deputy pilot, would not have placed him in any better situation in this proceeding.

"Under the sixth, seventh, and ninth assignments, we find the following proposition: 'The combination of defendants in error, which controls and monopolizes the pilotage at this port of Galveston, and prevents competition, is illegal, in that it is in restraint of commerce among the several states and with foreign nations.' The averment in the answer to which the proposition is applicable is as follows: 'That petitioners, contriving and intending to counteract the effect of free competition in pilotage at the port of Galveston, and to lessen their labors, and minimize the facilities they should offer all vessels entering and departing from said port, and to maintain arbitrarily the maximum rates of pilotage allowed by law, have associated themselves together as partners; that by reason of such association and agreement, they prevent competition and monopo-

lize the pilotage at said port of vessels engaged in the transportation of traffic and commerce along the several states and with foreign nations; that the combination and agreements of petitioners are in restraint of trade and commerce between the several states and with foreign nations, and illegal; that the trade, traffic, and commerce passing through the port of Galveston are restrained, hindered, and injured by said combination, and the acts of petitioners, and the fees charged by them.' The state, as already stated, may create the office of pilot. By the same act it has created the office of commissioners of pilots, who decide upon the qualificatons of applicants for branch or deputy pilots, and who recommend to the governor, where appointments are proper, such as are meritorious, etc. They may, for sufficient cause, upon hearing, suspend a pilot or deputy; and the governor has power, at will, to remove or reinstate one. The entire subject is under the control of the governor and the commissioners. So long as they see fit to retain defendants in error in office as pilots, plaintiff in error cannot question their right to exercise their functions. The very nature of an office is that it gives a monopoly of exercising the official acts pertaining thereto to the incumbent, to the exclusion of others, though equally fit. If they improperly conspire and combine, this might be conduct that would suggest their removal by the governor, or be cause for suspension by the commissioners. We cannot see how such acts would, while they are allowed to remain in office, in any manner affect their right to perform its duties, or to protect themselves in its emoluments."

The decision of this court in *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52, upholding the decision of Texas Court of Civil Appeals, amounts to nothing more than an affirmance of the doctrine first announced in *Petterson v. Board of Commissioners, supra*, to the effect that, since the deputy provision of the Texas law is merely directory, the statute is not unconstitutional. This court said:

> "The defendants in error, who were plaintiffs in the Court of original jurisdiction, as the duly licensed state pilots of the port of Galveston, Texas, sued in a Texas District Court to recover the damages averred to have been caused them by the alleged illegal action of the defendants in offering, when he was not authorized by law to do so, his services 'to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston.' An injunction was prayed restraining the defendant from acting 'in any manner as branch or deputy pilot, or pilot under the laws of the State of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified.' The defendant filed a general demurrer, and, reserving the demurrer, answered, raising special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. 68 S. W. Rep. 320. The case was taken to the Court of Civil Appeals for the First Supreme Judicial District, was then

transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District, where the decree below was afirmed, with a slight modification not necessary to be stated. The Supreme Court of the State having declined to review the action of the Court of Civil Appeals, his writ of error was prosecuted to the latter court.

"The defense raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the State of Texas had power to enact laws regulating pilotage in the ports of that State; and, second, if such power existed, whether the provisions of the statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the Fourteenth Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the State of Texas provide as follows: The governor is authorized to appoint for each port, whose population and circumstances shall warrant it, 'a board of five persons of respectable standing, to be known as commissioners of pilotage'. Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority

to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. Revised Statutes of the State of Texas for 1895, articles 3790, 3791, 3792, 3793, 3794, 3796 and 3803. * * *"

"It remains only to consider the contention based upon the Fourteenth Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage service, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions

> just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

Of course, piloting is subject to regulation, being vested with public interest. We contend only this: The regulation must not be arbitrary or discriminatory. We do not say that the appellants have an *absolute right* to be pilots. We do say, though, that they are entitled, equally with all others, *to be considered* for appointment. The equal protection clause of the Fourteenth Amendment entitles them to that opportunity. Under the law in force in Louisiana if the governor should desire to appoint the appellants he could not do so,—he could not even consider their application. The commissioned pilots themselves name those who may be considered, by naming the apprentices. Clearly, the statute is repugant to the equal protection clause of the Fourteenth Amendment.

If the apprentice provisions in the Louisiana statute were merely directory—as is the deputy provision in the Texas law—the appellants then would have no complaint. They might simply present their applications to the governor. They might lay before him the facts alleged

(R. p. 17) in their petition: that they are well qualified, each having had more than 15 years pilot experience; and that to bar them now from the port, when they heretofore have been cornered, so to speak, within its limits, and thereby put them entirely out of business, would be grossly unfair. They could present a very strong case to the governor.

The Louisiana Supreme Court upheld the statute as a valid exercise of the "public powers" of the state. The court said (R. p. 8):

> "It is indisputable that the right to follow any of the ordinary occupations of life is one of the privileges of citizenship, and this includes the right to pursue any lawful occupation without statutory restrictions except such restrictions as may be applied to all persons pursuing the same occupation under the same conditions. But it is also indisputable that there are certain occupations in which the public has such interest as will make those occupations subject to statutory regulations, or even prohibition. The constitutional provisions on which plaintiffs rely were not designed to interfere with the public powers of the State."

Apparently, it is the court's view that the power to regulate carries with it the power to discriminate. But of course that is not correct. The medical and legal professions are subject to regulation. Certainly a law giving a group of physicians or attorneys the power to control their professions, through an apprentice provision, would not be upheld. No different rule should prevail with

respect to piloting. Medicine and law are as thoroughly invested with public interest as piloting. The medical and legal professions are as old if not older than piloting. The commission issued to a pilot is nothing more than a certificate of competence and is not different in character from the certificates required of physicians and attorneys. In *Houston Pilots v. Goodwin*, 178 S. W. 2d 308, (1944), the Supreme Court of Texas said exactly that:

> "Doubtless everywhere pilots are licensed to practice pilotage only in particular waters, and only after they have passed an examination as to their competence therein. In Texas the license issued to pilot is issued to him as 'branch pilot' of a particular port. And such license is referred to in the statutes as though it were a commission which invests such branch pilot with an office. Art. 8270, et seq., relating to pilots of seaports; Art. 8248, et seq., relating to pilots of ports of navigation districts. The language of such statutes is misleading, for *the 'commission', which licenses a pilot to practice pilotage as the branch pilot of a particular port, is merely a certificate of competence, and does not differ in character from certificates of competence required of lawyers or doctors before they are permitted to practice law or medicine.*" (Italics ours.)

It is not surprising, considering the fact that the commissioned pilots have airtight control, that a "family organization" has developed under the administration of Act 54 of 1908 as amended. The petition shows that in 1938 and 1944, the last times that appointments were made, of the 15 appointed 12 were related to then commissioned pilots or to predecessor pilots; and that of the

41 present commissioned pilots, 34 of them are related to other pilots or predecessor pilots. It is not necessary to speculate on what could or might happen under this law—the facts are before us. Here are the appellants' allegations (R. p. 19) in that respect (which by law are admitted in considering the appellees' exception of no cause of action):

> "In substantiation of the foregoing allegations, your petitioners now list the names of those appointed by the defendant board in 1938 and in 1944, the last times that appointments were made, showing their relationship to pilots then commissioned, or to former commissioned pilots, and showing also their occupation prior to being chosen for appointment.

"1938:

Name	*Occupation*	*Relations*
H. Vogt	Ship Launch Tender	John Vogt—uncle Peter Vogt—father
Hugo Loga	Deck Hand River Tug Boat	E. P. Loga—brother J. P. Loga—father
Laurence Jurisich	Deputy Sheriff Parish Prison	Frank Jurisich—brother George Ziblich—uncle Jake Hansen—cousin Louis Ronquillo—cousin
Harry McNeely	Independent Pilot	S. S. McNeely—uncle A. T. Price—uncle J. G. Wilson—uncle
Charles Brown	3rd Mate on Foreign Vessel	Walter Thompson—uncle
Howard Cugle	3rd Mate on American Vessel	Charles Cugle—father
Jacob Hansen	3rd Mate on American Vessel	Geo. Ziblich—grandfather Jack Hansen—father
Frank Richard	River Tug Boat Mate	Frank Jurisich—cousin Louis Ronquillo—cousin Louis Ronquillo—cousin Frank Richmond, Sr.—father

1944.

Frederick A. Johnson	Shipyard worker	Charles Schalb—uncle
Paul Delesdernier	Dock Board Employee	Ira Delesdernier—brother Hugo Loga—cousin E. P. Loga—cousin Alford Loga—cousin George Loga—cousin Joseph Loga—uncle
William F. Short	Shipyard worker	A. W. Short—father W. F. Short—grandfather
Stanton Vogt	Dock Board Employee	Peter Vogt—father Henry Vogt—brother John Vogt—uncle Hugh Vogt—uncle
Jesse H. Sheffield	Steamship mate	none
Leander J. Marel	Tug Boat Captain	none
William L. Heuer, Jr.	Tug Boat Mate	none"

The Supreme Court of Louisiana said in this case:

> "The services in which pilots are engaged is one of great importance, frequently full of hardship and sometimes of peril and, regardless of time and weather conditions, they must be in their places ready to perform the duties of their vocation."

But the considerations there mentioned do not overbalance the Constitution. Too, under the federal law governing coastwise vessels, all applicants have equal opportunity for license, and there is no suggestion that coastwise navigation does not function properly. The hardships and perils and conditions mentioned above confront pilots of foreign and coastwise vessels alike. Pilots of foreign vessels face no hardships or perils or conditions that are not faced by pilots of coastwise vessels. There is no difference whatever between the duties and responsibilities of pilots of the two classes of vessels. The classes do not differ as to size, capacity, tonnage, or the like. As a matter of fact, some vessels sometimes sail in coastwise trade under enrollment and other times under registry in foreign trade. Pilots capable of handling an enrolled or coastwise vessel are equally capable of handling registered or foreign vessels. The vessels follow the same course on the Mississippi. We mention this to demonstrate that no reason—practical or otherwise—can be found for a discriminatory law governing foreign shipping.

As stated, *Olsen v. Smith, supra,* was decided in this court in 1904. There is later jurisprudence on this subject in which *Olsen v. Smith, supra,* is considered,—and the decision has not been given the interpretation placed upon it by the appellees.

State v. Board of Pilotage Commissioners, 198 Wash. 695, 90 P. 2d 238, (1939), is similar in principle to this case. The defendant, Board of Pilotage Commissioners, had closed the doors to all applicants for pilot licenses except those of its own selection. The court held that according to the terms of the statute in question the board had no right to limit the number of pilots and ordered the board, by mandamus, to examine the relator pilots. In the course of the opinion the court said, emphatically, that any statute would confer upon a pilot board the arbitrary right to license one applicant and refuse to license another, although equally qualified, would be unconstitutional. The court said:

> "It may be conceded that an administrative board, such as respondent, has considerable discretion in carrying out its duties, and that, as a general rule, such discretionary powers are not subject to review by the courts. This is not, however, a universal rule. If the action of the board is arbitrary or capricious, or was prompted by wrong motives, there is not only an abuse of discretion, but, in contemplation of law, there has been no exercise of the discretionary power, and in such cases the law will, by mandamus, compel the tribunal to act honestly and fairly. State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 P. 544; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 P. 1064.

"We agree with respondents that the court may not substitute its judgment for that of the board, and direct that licenses be issued to appellants, or to any particular person, or that any definite number of pilots be licensed, or fix any definite time when examinations shall be held, or prescribe the general conditions under which such examinations shall be conducted. However, we believe there are certain duties required of respondents by the act, which are mandatory, and in which respondents have no discretion. We think it is mandatory that the board provide for competitive examinations; that they permit such examination to be taken by any person whose application, showing him to have the statutory qualifications, together with the statutory fee, is on file with the board at the time such examination is given; and that licenses be issued only after examinations have been taken, and then only to applicants having the qualifications prescribed by the statute.

"We are clearly of the opinion that appellants Landstrom and Jensen should have been permitted to take the examination on June 11, 1935, and that for the benefit of these two appellants at least, the board should be compelled to hold an examination.

"Appellants contend that, if a fair and reasonable construction is given to the act, it would violate no constitutional provision, but that it would violate both article 1, S. 12, of the state constitution, and the fourteenth amendment of the Constitution of the United States, U. S. C. A., if construed as contended for by respondents, to the effect that the board is therein given authority to issue a license to any applicant they may believe to be qualified,

regardless of whether or not he has taken an examination, or has the qualifications prescribed by the statute, and that it gives the board the right to limit the number of licenses issued.

"We agree with appellants that the act would be unconstitutional if given the construction contended for by respondents, in that it would leave to the board the right to determine to whom licenses should be issued upon a personal basis, at the will and pleasure of the board and not upon any basis prescribed by the legislature. It would vest in the board arbitrary power to license one applicant and refuse to license another, although qualified in every respect. Seattle v. Gibson, 96 Wash. 435, 165 P. 109; State ex rel. Makris v. Superior Court, 113 Wash. 296, 193, P. 845, 12 A. L. R. 1428; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305. *All of the foregoing cases were rested upon the principle that an ordinance which authorizes the issuing or withholding . . a license to engage in a lawful business, that is, a business which within itself is perfectly lawful, and commits to any officer or set of officers the power to decide, according to their own notions in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the fourteenth amendment of the Constitution of the United States.* In S. 12, of article 1, of our state constitution, we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any

citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." (Italics ours.)

The Supreme Court of Louisiana in this case approved the ruling in *State vs. Board of Commissioners, supra.* There the court said, as will be noted, that a law giving a pilot board authority to discriminate would be unconstitutional. Under the Louisiana statute the pilots themselves control the appointments. The case here is far worse than the case where a pilot board is given power to discriminate. It is one thing to have a board control appointments but far worse to vest that authority in the pilots themselves. For they have a selfish motive to serve—they can admit those of their own selection and exclude others. But the result is the same whether the discrimination results from board action and from the action of pilots themselves. Outsiders are prohibited from engaging in the trade or calling. There is no less a denial of equal protection of the law.

The comment of the Washington Supreme Court in *State v. Board of Pilotage Commissioners, supra,* on *Olsen v. Smith, supra,* is interesting. The court interpreted the latter decision as holding merely that a state may regulate pilotage by giving the governor the power to appoint—which in fact is the true doctrine of that case. In *State v. Board of Pilotage Commissioners, supra,* the Court said:

> "In the Olsen case, supra, the constitutionality of a pilotage act of the state of Texas was questioned, on the theory that the legislature had no right to attempt to regulate pilotage service, as it was not subject to governmental control. This act conferred upon the governor of the state of Texas the authority to appoint any number of branch pilots that might from time to time be necessary."

In *State v. Turner*, 143 Fla. 424, 196 So. 816, (1940), the pilot commisioners attempted to control the stevedore business within the port, by licensing only such firms as it chose. The court held against the board, saying:

> "Under Section 3860, C. G. S., a pilot commission has authority to limit the number of licenses granted with due regard to the business of the port. *But if this section 19, of Article 9 of Chapter 17506 is to be construed as vesting in the Port Apthority acting as a Pilot Commission authority to license or refuse to license competent and reliable contracting stevedores at their pleasure, or to place in their licenses such limitations or restrictions as they may see fit as to the particular owners or masters of vessels with whom they will be permitted to do business, or at their pleasure to permit one stevedore to operate at the Port while another equally qualified is denied, said section 19, so construed, would come in conflict with sections 1 and 12 of the Declaration of Rights and the Fourteenth Amendment to the Federal Constitution.* As was said in Maxcy v. Mayo, 103 Fla. 52, 139 So. 121, 129:

"'It has long since become an established rule of constitutional law in these United States that power and discretion, however exerted, and by whosoever exercised, must be used in such manner as not to infringe upon or impair the fundamental rights of life, liberty, property, and the pursuit of happiness. The very idea (as one opinion delivered by the Supreme Court of the United States puts it) that one man may be compelled to hold his life, business, property, means of living, or any material thing essential to his enjoyment of life, at the mere will of another, is intolerable in any country where freedom prevails, and is the very essence of slavery itself. Yick Wo v. Hopkins, 119 U. S. 356, 6 S. Ct. 1064, 30, L. Ed. 220.'

"See, also, Ellis v. Thiesen, 78 Fla. 47, 82 So. 607; State ex rel. Pittman v. Barker, 113 Fla. 865, 152 So. 682, 94 A. L. R. 1481; State ex rel. Kennel Club, Inc., v. State Racing Commission, 116 Fla. 143, 156 So. 317; State ex rel. Kennedy v. Knott, 123 Fla. 295, 166 So. 835; State ex rel. Tullidge v. Hollingsworth, 103 Fla. 801, 138 So. 372.

"The Port Authority acting as a Pilot Commission has not denied the competency and integrity of the relator Stevedoring Company but has admitted it by offer to give it a permit to handle the cargoes for two lines. Indeed, such admission was made each time they issued the licenses to the relator and accepted the $100 annual permit fee, during the years 1934 to 1938." (Italics ours.)

There is no difference in principle between the case where the rights of a contracting stevedore are involved and the case involving the rights of applicants for pilot licenses. The stevedoring business is vested with public interest very much as is piloting. It is important to the safety of the ship that it be properly loaded. In *State v. Turner, supra*, the court took occasion to remark:

> "It is further pointed out that the duties of a contracting stevedore at a great port like Port Everglades, or any other port of this State, are important, the responsibility is grave, and that the proper performance of his work may determine whether the vessel loaded by him can make a safe voyage."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, this court said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with

a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this Court in Henderson v. Mayor, etc., of New York, 92 U. S. 259 [Bk. 23, L. ed. 543]; Chy Lung v. Freeman, 92 U. S. 275 [Bk. 23, L. ed. 550]; Ex parte Va., 100 U. S. 339 [Bk. 25, L. ed. 676]; Neal v. Delaware, 103 U. S. 370 [Bk. 26, L. ed. 267], and Soon Hing v. Crowley [supra]." (Italics ours.)

The court held in *Yick Wo v. Hopkins, supra,* that a law enacted "with an evil eye and an unequal hand" violates the Fourteenth Amendment. With that principle in mind let us consider this law and particularly the 1942 amendment. The petition shows that the original law, Act 54 of 1908, was administered always for the benefit, exclusively, of the favored commissioned pilots. Knowledge of the facts in that connection is charged to the legislature. The legislature in 1942 came along and placed the port within their exclusive domain—knowing that no pilot except those having the favor of the com-

missioned pilots had a chance of being commissioned. We say that both the original act and the 1942 amendment were passed "with an evil eye and an unequal hand". Certainly the 1942 amendment was so enacted.

In *Snowden v. Hughes*, 321 U. S. 1, 88 L. Ed. 497, this court pointed out that every denial of a right conferred by state law does not necessarily involve a denial of the equal protection of the law, even though the denial of the right to one may operate to confer it on another. The court said:

> "The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

It is plain, we believe, that Act 54 of 1908, as amended, is unconstitutional on its face. But even assuming *arguendo* that the act is not unconstitutional on its face, the arbitrary, unjust and discriminatory administration of the act is still within the prohibition of the Fourteenth Amendment, under the doctrine of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, and the other cases cited above.

In *Ring v. Patterson*, 170 Or. 234, 1 P. 2d 1105, (1931) the plaintiff pilot alleged that the pilot board was controlled by a pilot organization. The court found as a fact that the board was not so controlled. The court said however that it is illegal for a board to be so controlled:

"Evidently recognizing the above principles of law, the petitioner sought to bring himself within an exception by charging that the commissioners had given themselves over to the control of the Columbia River Pilots' Association, had refused to grant him a license unless he would become a member of that organization, and unless the association favored his application. He relies upon the statement of the exception contained in 38 C. J., Mandamus, p. 598, S. 74, where the writer states that the writ may issue when the discretion of the quasi-judicial officer has been abused. In the determination of this issue of fact we feel justified in resorting to the presumption that official duty has been regularly performed (section 9-807, Oregon Code 1930), which of necessity includes a disputable presumption that the public officer has reasonably exercised his discretionary power. New York ex rel. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424. We have carefully read the testimony taken before the referee and have examined all of the exhibits introduced in evidence, but fail to find that a preponderance of the evidence indicates that the commissioners have subjected themselves to the dictates of the Columbia River Pilots' Association. The issue is one of fact only, and since no purpose would be served by an extended statement of our review of the evidence, we content ourselves with a statement of our finding that a preponderance of the evidence fails to substantiate petitioner's charge."

In *Williams v. Molther*, 198 Fed. 460, (1912), the court had this to say in respect to the federal pilotage law:

> *"While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it.* The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. *Moreover, as we stated in our previous opinion, 'such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers'."* (Italics ours.)

Note the court's reference to "dangerous monopoly". It would be difficult to imagine a tighter monopoly than that maintaned by the port pilots in Louisiana.

In *Williams v. Pope*, 215 Fed. 1000, (1914), the court had this to say in a case involving the federal pilotage law:

> "In my opinion, complainant's failure to take an appeal from the determination of the local inspectors is fatal to his cause of action, unless he can show that there was a conspiracy among the defendants and the supervising inspector to refuse him a pilot's license notwithstanding his fitness to properly fill the position of pilot. But the existence of a conspiracy to injure the complainant or to wrongfully deprive him of a license, though averred in the bill, is not shown, nor is there any evidence whatever of bad faith or ulterior motive on the part of the local inspectors in the discharge of their official duties in denying him a license. The inspectors apparently acted in perfect good faith throughout his examination, conscientiously determining his percentage."

The general rule on the subject is stated in *Corpus Juris Secundum*, Volume 16, Section 659, page 1390, thus:

> "The constitutional guaranty of due process is not violated by the fact that the granting of licenses is committed to administrative officers, who, within certain limitations prescribed by law, are authorized to exercise their discretion in the granting or refusing of licenses to particular persons or corporations, but *it is otherwise where an official or board is invested with authority to grant or withhold a license according to his or their arbitrary discretion.*" (Italics ours.)

City of Seattle v. Gibson, 96 Wash. 425, 165 P. 109, states the rule thus:

> "We have no doubt of the right of the city to require certain qualifications of applicants, not inconsistent with state law, and to provide how those qualifications may be determined, but *it may not say, by special act, that one person, or set of persons, may engage in any particular lawful calling to the exclusion of all other persons. Persons equally qualified are entitled to the same privileges under the law, and a statute or an ordinance is void which interferes with or abridges the privileges and immunities of citizens who are equally entitled to the protection of the law.* There can be no reasonable escape from the conclusion that this ordinance provides for a discretion which is purely arbitrary, and, therefore, an illegal method of determining who shall and who shall not be granted a license to conduct a drug store or pharmacy." (Italics ours.)

In *Highland Farms Dairy v. Agnew*, 16 Fed. S. 575, (1936), the court had this to say in passing on a law that provided for the appointment of a milk commission:

> "Nevertheless it is not inappropriate to point out that *the license provisions of the Act should not be interpreted to vest the Board with the absolute power to grant or refuse license, if any other reasonable construction can be adopted. Such a grant of power would be invalid*, and the attempt to exercise it arbitrary would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. Yick Wo v. Hop-

Delaware, 103 U. S. 370 (26:567); Yick Wo v. Hopkins, 118 U. S. 356 (30:220); Gibson v. Mississippi, 162 U. S. 579 (40:1078)."

The appellees cite *Bradwell v. Illinois*, 16 Wall. 130 (1873), *Ex Parte Lockwood*, 154 U. S. 116 (1894), and *Lehon v. Atlanta*, 242 U. S. 53, 37 S. Ct. 70 (1916), as authority for the proposition that the Fourteenth Amendment does not apply to pilotage.

Bradwell v. Illinois, supra, and *Ex Parte Lockwood, supra*, hold that a state may prohibit women from practicing law within its jurisdiction. State laws may provide different rules for different *classes* of persons as long as the classification is reasonable. The cases above are consistent with that rule of law. The general rule on the subject is stated in *Holter v. Nebraska*, 205 U. S. 34, 27 S. Ct. 419 (1902), thus:

> "It is well settled that, when prescribing a rule of conduct for persons or corporations, a state may, consistently with the 14th mendment, make a classification among its people based 'upon some reasonable grounds,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.' Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 160, 165, 41 L. ed. 666, 669, 670, 671, 17 Sup. Ct. Rep. 255."

Class legislation is valid only where it affects alike all persons similarly situated. In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350 (1887), this court said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which

is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' 113 U. S. 27, 32 (28:923, 925)."

Bradwell v. Illinois, *supra*, and *Ex Parte Lockwood*, *supra*, are distinguishable, plainly, from this case. The state statutes in question there applied equally to all women within their jurisdiction,—none were permitted to practice law. A law analogous to our pilot law would be one giving to a particular group of attorneys the power to control and monopolize law business within the state, through a provision requiring service as an apprentice under the group—similar to the apprentice provision in Act 54 of 1908. Certainly such a law would not be upheld.

Lehon v. Atlanta is not in point here. According to the law in question there, approval of the state police board as to fitness and character was required of persons seeking to operate private detective agencies. A pilot law merely requiring of applicant pilots like approval of a pilot board would not be objectionable. As a matter of fact most laws regulating particular occupations or professions re-

kins, 118 U. S. 356; People of State of New York ex rel. Lieberman v. Van DeCarr, 199 U. S. 552; Douglas v. Noble, 261 U. S. 165; Lehman v. State Board of Public Accountancy, 263 U. S. 394." (Italics ours.)

In *Lieberman v. Van DeCarr*, 199 U. S. 552, 26 S. Ct. 144, this court said, in passing on a sanitary code of New York City:

> "Such regulations, however, should be uniform, and the Board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer (in a lawful commodity) and refuse a license to another similarly situated, undoubtedly it would be invalid."

See also *Zucht v. King*, 260 U. S. 170, 67 L. Ed. 194.

We submit that the judgment appealed from is incorrect and should be reversed, and the Act 54 of 1908, as amended by Act 134 of 1942, decreed to be unconstitutional.

Respectfully submitted,

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This is to certify that copies of this Brief have been served opposing counsel on this .... day of ..... 1946.

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